

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

31508

**FILE:** B-216688**DATE:** June 20, 1985

**MATTER OF:** National Park Service--Disposition of  
Performance Bond Forfeited to Govern-  
ment by Defaulting Contractor.

**DIGEST:**

A performance bond, forfeited to the Government by a defaulting contractor, may be used to fund a replacement contract to complete the work of the original contract. The performance bond constitutes liquidated damages which may be credited to the proper appropriation account in accordance with the analysis and holding in 62 Comp. Gen. 678 (1983). 46 Comp. Gen. 554 (1966) is modified to conform to this decision. Requirements for documentation of the accounting transactions are set forth in the GAO Policy and Procedures Manual for Guidance of Federal Agencies.

This decision is in response to a request dated October 1, 1984 (Reference: S7217(MWR-AB)) from Mr. Donald L. Sondag, an Authorized Certifying Officer of the National Park Service. Mr. Sondag requests a decision as to whether a performance bond, forfeited to the Government by a defaulting contractor, may be used to fund a replacement contract. If we answer yes to his first question, he asks further, what documentation would be necessary to authorize the obligation of the performance bond funds. As set forth below, we conclude that the performance bond in question may be used to fund a replacement contract. Further, requirements for documentation of the transaction are set forth in the GAO Policy and Procedures Manual for Guidance of Federal Agencies.

**Facts:** On August 17, 1983, the National Park Service awarded a contract for the sale of Government property to Mr. Fred Boreman for the removal of greenhouses in an area of planned development at the Cuyahoga Valley National Recreation Area. The contract called for Mr. Boreman to pay the Government \$6,500 for the salvage value of the greenhouses and to post a performance bond of \$2,500. The \$6,500 received from Mr. Boreman by the Park Service was deposited in the General Treasury Land and Water Conservation Fund for sale of surplus property. Mr. Boreman duly removed the greenhouses, but thereupon abandoned the site and failed to remove debris and restore the site to a natural state in accordance with the terms of the contract. Mr. Boreman's default resulted in the forfeit of his \$2,500 performance bond to the Government.

032358

The National Park Service intends to solicit bids to complete the demolition and restore the site, which it estimates will cost \$10,000 to \$15,000. The Service asks whether the forfeited \$2,500 performance bond may be used to fund partially the replacement contract.

Analysis: The performance bond in this case constitutes liquidated damages. Section 4 of the "Special Terms and Conditions of Sale" attached to the invitation for bids reads, in part:

"A performance bond will be required in the amount of two thousand five hundred dollars (\$2,500) per lot or lot item as indicated, to assure completion and cleanup of the site. A performance bond may be furnished in the form of cashiers check, money order, certified personal check or cash. Checks are to be made payable to the National Park Service. The Performance Bond will be forfeited to the Government in the event the buildings or structures have not been removed and/or the site cleaned up to the satisfaction of the Contracting Officer and/or his designated representative, within the time limit specified, all rights, titles, interests, and bond amount will be forfeited to the Government and the payments thereon made will be retained by the Government as liquidated damages." (Emphasis in original.)

The traditional rule for funds received by a Government agency as liquidated damages for a contractor's default is that they may be retained in the appropriation originally charged with the contract. 44 Comp. Gen. 623, 626 (1965). The two rationales for retaining liquidated damages in the appropriation account rather than depositing them in the Treasury as miscellaneous receipts are that they effect an authorized reduction in the price of the individual contract concerned, and that this would make them available for return to the contractor should he subsequently be relieved of his liability. 23 Comp. Gen. 365 (1943); 9 Comp. Gen. 398 (1930).

However, the rule that liquidated damages may be returned to an appropriation account has been held to be inapplicable where the above rationales do not apply; for example, when a contractor has received no payment from the Government and it is unlikely that the contractor would or could contest the default. 46 Comp. Gen. 554, 556 (1966). Those circumstances

are present here. In the instant case, no funds were paid by the Government to the contractor. Further, Mr. Boreman has abandoned the site and, despite repeated notices, has given no indication that he will contest the forfeiture of the performance bond. Accordingly, we conclude that the two rationales of the traditional rule regarding the disposition of liquidated damages--that they may be retained in an appropriation account rather than deposited in miscellaneous receipts--are not applicable here.

Nonetheless, we need not depend on the traditional rule regarding the disposition of liquidated damages (and its associated cases) in resolving this case. In 62 Comp. Gen. 678 (1983), this Office overturned a long line of cases in establishing a new rule regarding the retention of "excess costs of reprocurement" received by the Government from Government contractors. In previous cases, we had held that such funds must be deposited into the general fund of the Treasury rather than the appropriation from which the contract payments were made. See, e.g., 27 Comp. Gen. 117 (1947). However, in 62 Comp. Gen. 678, we changed our position and concluded that that rule disrupted the procurement process and was not required by statute. We held:

"We do not think it is logical to insist that a breaching contractor is legally responsible for excess reprocurement costs and then, when the contractor fulfills that obligation, refuse to permit his payments to be used for that purpose. We regard the contractor's payments as being analogous to a contribution to a Government trust account, earmarked for a specific purpose. Just as the proceeds of a trust are considered to be appropriated for the purpose for which the funds were deposited, so too should excess reprocurement collections be considered to be available only for the purpose of funding a replacement contract.

"This use of the recovered excess reprocurement costs does not, in our view, constitute an illegal augmentation of the agency's appropriation. The agency is being made whole at no additional expense to the taxpayer. It will merely be receiving the goods or services for which it bargained under the original contract." 62 Comp. Gen. at 682.

We conclude that the analysis in 62 Comp. Gen. 678 regarding recovered excess reprocurement costs is equally applicable

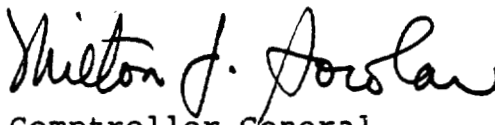
to the liquidated damages recovered in the instant case. In our view, the legal distinction between damages received from a defaulting contractor for the excess costs of procurement and liquidated damages specified in the contract is not pertinent. When used for the purpose of funding a replacement contract, both serve the purpose of making the Government whole and ensuring that the Government receives the goods or services for which it bargained under the original contract.

Accordingly, we conclude that the proceeds of the \$2,500 performance bond forfeited by the contractor in the case at hand may be used by the National Park Service to fund a replacement contract to complete the work which was to have been performed under the original contract. To the extent our decision in 46 Comp. Gen. 554 (1966) is inconsistent with that result, that decision is modified accordingly.

Finally, the National Park Service asks what documentation would be necessary to authorize the retention and subsequent obligation of the performance bond. The GAO Policy and Procedures Manual for the Guidance of Federal Agencies provides:

"Collections that are credited to appropriation and fund accounts must be proper and be authorized by law or appropriate regulations. Agencies must be able to produce references to such authorizations if they are called for in connection with the audit of accounts by the General Accounting Office. Agency collection records pertaining to refunds and reimbursements will include descriptions of transactions sufficient for identifying the source of, or reason for, the collection." GAO, Policy and Procedures Manual for the Guidance of Federal Agencies, tit. 7, § 12.4. (TS No. 7-40, July 14, 1983).

The National Park Service should document the retention of the performance bond in accordance with that provision. The funds could then be obligated for the replacement contract like any other available funds.

*for*   
Comptroller General  
of the United States